

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

SEP 17 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Applications for Consent to the  
Transfer of Control of Licenses of

**MediaOne Group, Inc.**

Transferor,

**AT&T Corp.,**

Transferee

CS Docket No. 99-251

**REPLY COMMENTS OF SEREN INNOVATIONS, INC.**

Peter M. Glass  
Seren Innovations, Inc.  
15 South 5th Street  
Minneapolis, Minnesota 55402  
(612) 395-3500

James W. Olson  
Gregory F. Intoccia  
Howrey & Simon  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 783-0800

Counsel for Seren Innovations, Inc.

September 17, 1999

No. of Copies rec'd 014  
List ABCDE

## **EXECUTIVE SUMMARY**

Seren has reviewed the comments and petitions to deny filed in the initial round of this proceeding and believes they establish conclusively that if the Commission does approve AT&T Corp.'s acquisition of the MediaOne Group, Inc., it should only do so subject to suitable program access conditions. Those provisions should be designed to ameliorate the enormous power which the merged entity will possess and will have the incentive to utilize to deter competition in the multichannel video programming distribution marketplace.

Seren was formed in 1996 to provide high-speed Internet, cable television and telephone services to residential and business customers through a broadband hybrid fiber optic and coaxial cable network. Seren has begun offering services in two Minnesota cities, has secured cable franchises in two more and has received one cable franchise and has several applications pending in Northern California localities.

Seren has found its ability to obtain programming has been hindered by exclusive contracts AT&T/TCI has entered into with programmers and has been denied access to several programming networks because of such contracts. The merger will make Seren's access to programming and consequent ability to compete with AT&T even more difficult. In fact, AT&T will control approximately twice as many cable subscribers as contemplated by the Commission's Horizontal Ownership Rules with their thirty percent cap, and more than twice the number of subscribers its predecessor, TCI, controlled in 1992, which led in significant part to passage of the 1992 Cable Act. AT&T will have amassed this power in an industry which itself still overwhelmingly monopolizes the multichannel video programming distribution market and has been marked over the last year by a dramatic increase in consolidation and clustering.

AT&T's resultant ability to coerce programmers is far beyond the level of monopsony power which led Congress to include the program access provisions in the 1992 Cable Act. Unfortunately, while the program access provisions of the 1992 Act had some initial success in making vertically-integrated programming available to cable's rivals, the Commission's recent

rulings that the program access provisions do not reach non-vertically integrated or terrestrially-delivered programming, increasingly have limited the effectiveness of program access as a tool to promote competition. As a result, the development of competition to cable has been hindered, particularly on the part of companies such as Seren which offer direct head-to-head competition to the cable monopolists and drive inflated cable prices down while offering superior service.

Seren agrees with the recommendations made by Ameritech, Bell South and the Wireless Cable Association International that to prevent the merger from allowing AT&T to further handicap its rivals, AT&T's ability to enter into exclusive contracts with programmers must be curtailed. Seren recommends that the Commission require AT&T to agree as a condition of merger approval not to enter into any exclusive video programming contract that would otherwise not be subject to the program access rules, unless AT&T first is able to demonstrate that such an exclusive contract is in the public interest according to the criteria of 47 U.S.C. § 628(D)(4) and 47 C.F.R. § 76.1002(c)(4) and (5).

## TABLE OF CONTENTS

	Page(s)
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. SEREN'S INTEREST .....</b>	<b>2</b>
<b>III. AT&amp;T AND MEDIAONE MUST DEMONSTRATE THAT THIS MERGER IS IN THE PUBLIC INTEREST .....</b>	<b>3</b>
<b>IV. ANALYSIS .....</b>	<b>4</b>
<b>A. AT&amp;T Will Completely Dominate The Already Rapidly Consolidating Cable Industry As A Result Of This Merger.....</b>	<b>4</b>
<b>B. Cable MSOs Still Monopolize The Multichannel Video Programming Distribution Market.....</b>	<b>7</b>
<b>C. Program Access Is Key To The Development Of MVPD Competition And Is Threatened By This Merger.....</b>	<b>9</b>
<b>V. CONCLUSION .....</b>	<b>14</b>

CS Docket No. 99-251

<sup>1</sup> See Public Notice, *AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent for a Proposed Transfer of Control*, CS Docket No. 99-251, DA 99-1447 (rel. July 23, 1999).

with Ameritech, BellSouth, and the Wireless Cable Association International<sup>2</sup> that such conditions must extend program access protection to all of AT&T's programming contracts.

## II. SEREN'S INTEREST

Seren Innovations is a non-regulated subsidiary of Northern States Power Company, formed in 1996 to provide high-speed Internet, cable television and telephone services to residential and business customers through a state-of-the-art hybrid fiber optic and coaxial cable broadband network. Seren has received cable television franchises in St. Cloud, Sartell, Sauk Rapids and Waite Parke, Minnesota and presently is providing cable, high-speed Internet and telephone service in St. Cloud and Waite Parke. Seren was granted a cable franchise in Concord, California on July 27, 1999 and has applications pending for cable franchises in Walnut Creek, Danville, Pleasant Hill, Clayton and in unincorporated Contra Costa County, California. Seren plans to file applications for franchises in other Contra Costa communities in the coming months.<sup>3</sup>

Just this month, Seren's St. Cloud area system began offering its cable subscribers 239 channels, more than 150 of which employ digital technology. Additionally, Seren's \$11.95 Basic tier level of service was upgraded from twenty-two to a full thirty-one channels and its \$26.95 Premier Pak level of service from fifty-four to a total of eighty channels, all at no additional charge. Digital offerings include a Digital Family Tier, including eight Discovery channels and Noggin', among others, as well as other grouped tiers such as Digital Sports, Digital Life, Digital Music, and Digital Movie Lovers.

---

<sup>2</sup> *Comments of Ameritech, Comments of Bell South Corp., et al., Comments and Request for Imposition of Conditions of the Wireless Communications Association International*, all dated August 23, 1999.

<sup>3</sup> AT&T's *Application* erroneously reports that Seren has applied for a cable franchise in Colorado in an apparent attempt to conjure up as much competition to its cable monopolies as possible. See AT&T Corp. and MediaOne Group, Inc.'s Application for Authority to Transfer Control ("*Application*"), filed July 7, 1999, at 52.

Seren is dedicated to fulfilling the intent of the Telecommunications Act of 1996<sup>4</sup> by providing competition to entrenched incumbents in cable and telephone markets and by offering advanced services to both business and residential customers. Its efforts to do so have been hindered by numerous exclusive programming contracts entered into by AT&T and its affiliates, as discussed below. Unless this Commission places appropriate conditions on this merger, AT&T will have the incentive and ability to use its greatly enhanced monopsony power to further restrain the ability to compete of rivals such as Seren.

### **III. AT&T AND MEDIAONE MUST DEMONSTRATE THAT THIS MERGER IS IN THE PUBLIC INTEREST**

This Commission has made it clear on a number of occasions that the burden of proof is on merging parties to demonstrate that their merger would benefit the public interest.<sup>5</sup> As part of that burden, they must show that the transaction serves the interest of competition. The public interest standard has long been held to include an assessment of the effect of a transfer on competition. As the Supreme Court put it: “[t]here can be no doubt that competition is a relevant factor in weighing the public interest.”<sup>6</sup> In fact, the Commission has held that its public interest analysis of competition goes beyond a standard analysis following antitrust principles to encompass the broader policy goals of the Communications Act.<sup>7</sup>

It should be noted that the proposed merger between AT&T and MediaOne presents much more difficult competition issues than the AT&T-TCI merger. Unlike that case, here the Commission is being asked to approve a merger between two of the largest cable MSOs, to

---

<sup>4</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>5</sup> *E.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3169 (1999) [hereinafter *TCI Order*]; *Applications of NYNEX Corp., and Bell Atlantic Corp., For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd. 19,985, 20,008-20 (1997).

<sup>6</sup> *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953).

<sup>7</sup> *TCI Order*, 14 FCC Rcd. at 3168.

create an entity with overwhelming dominance in MVPD markets. Before such a merger is approved, it is the responsibility of the parties to demonstrate by a preponderance of the evidence that the merger will advance competition, including the pro-competitive goals of the Telecommunications Act of 1996. As demonstrated below, unless this merger is properly conditioned, that burden cannot be satisfied.

#### **IV. ANALYSIS**

##### **A. AT&T Will Completely Dominate The Already Rapidly Consolidating Cable Industry As A Result Of This Merger**

It was in large part the size and abuse of its dominant position in monopoly local franchise markets by TCI, AT&T's predecessor, which led to the passage of the 1992 Cable Act. As Senator Danforth, one of the managers of the 1992 Act, cautioned: "Right now, one company, TCI, controls programming for a quarter of the homes in America that have cable service. We think that there is a problem if a single company controls that much access, or more access, to the homes of America."<sup>8</sup>

The program access provisions of the 1992 Act were enacted to prevent the exploitation of that power in programming markets to the detriment of rival MVPDs. To further limit the market power of the largest MSOs, Congress directed the Commission to establish "reasonable limits" as to the number of subscribers an MSO could reach.<sup>9</sup> While the Commission's resultant Horizontal Ownership Rules,<sup>10</sup> which established a thirty percent limit, have been voluntarily

---

<sup>8</sup> 138 Cong. Rec. S672 (daily ed. Jan. 30, 1992) (statement of Sen. Danforth).

<sup>9</sup> 47 U.S.C. § 613(f).

<sup>10</sup> See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264, *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 14,462, 14,464 (1998). See also 47 C.F.R. § 76.503 ("Horizontal Ownership Rules").

stayed by the Commission pending the outcome of a Constitutional challenge,<sup>11</sup> there is no reason why the Commission should not be guided by the reasoning behind the Horizontal Ownership Rules in assessing the competitive impact of the merger. AT&T's acquisition of MediaOne, with the latter's 25.5 percent interest in Time Warner, will completely shatter the ceiling of the Horizontal Ownership Rules. AT&T will have attributable to it approximately sixty percent of the national total of homes passed, or more than twice the amount that caused congressional alarm in 1992.<sup>12</sup>

AT&T argues that its interest in TWE is "purely passive",<sup>13</sup> despite the fact that it will have the right to appoint two of six board members and appears to have no legal constraint on its activities in regard to TWE.<sup>14</sup> The prospect of a similar twenty-five percent ownership in TWE by TCI caused a Federal Trade Commission majority to note:

Such a substantial ownership interest, especially in a highly concentrated market with substantial vertically interdependent relationships and high entry barriers, poses significant competitive concerns. In particular, the interest would give TCI greater incentives to disadvantage programmer competitors of Time Warner; similarly, it would increase Time Warner's incentives to disadvantage MVPDs that compete with TCI. The Commission's

---

<sup>11</sup> See *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *subsequent appeal sub nom. Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (oral argument scheduled for Dec. 3, 1999).

<sup>12</sup> The complex and intertwined nature of the cable industry ownership structure is reflected in the difficulty in ascertaining exactly what AT&T's market share is. For this reason, nearly every commenter comes up with a slightly different number for AT&T's cable market share. See *Petition of GTE Services Corp., et al. to Deny Application, or in the Alternative, to Condition the Merger on Open Access Requirements* at 9 (64 percent); *Petition of SBC Communications Inc. to Deny Application* at 22 (62-65 percent); *Petition of US West to Deny Applications or to Condition Any Grant* at 6 (60.8 percent); *Comments of DirecTV, Inc.* at 3 (approximately 60 percent); *Comments of Ameritech* at 9 (59 percent); *Petition to Deny of Consumers Union, et al.*, at 4 (58 percent), all dated August 23, 1999.

<sup>13</sup> *Application* at 44.

<sup>14</sup> *Application* at 16-17.

remedy would eliminate these incentives to act anticompetitively by making TCI's interest truly passive.<sup>15</sup>

This Commission has made clear its own view as to the anti-competitive potential of such an ownership interest. MediaOne's TWE holding, as well as AT&T's thirty-five percent Cablevision Systems ownership interest, are far above the five percent attribution level of the Horizontal Ownership Rules. Just last month the Commission reaffirmed the validity of the five percent attribution threshold, stating "a growing body of academic evidence indicates that an interest holder with 5 percent or greater ownership of voting equity can exert considerable influence on a company's management and operational decisions."<sup>16</sup> In this instance, as Bell Atlantic points out, AT&T's interest in every cable company attributed to it under the Commission's rules is at least *twenty* percent.<sup>17</sup> Here, even a lower ownership level is likely to lead to influence, inasmuch as the interests of AT&T and its affiliates do not conflict because they are not competitors, but rather have an incentive to bargain cooperatively or even collusively.

In fact, the potential harm to competition of this merger is greatly magnified because it takes place against a backdrop of rapid consolidation in the industry overall. In the last year, the subscriber share of the top seven MSOs has increased from sixty-six percent to approximately eighty-eight percent.<sup>18</sup> As of May 1999, it was reported by *Broadcasting & Cable* magazine that ten of the cable MSOs on its Top twenty-five MSO list from 1998 had disappeared, and in the

---

<sup>15</sup> Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney. *Time Warner*, No. C-3709, 1997 FTC LEXIS 13 at \*62-\*63 (F.T.C. Feb. 3, 1997) (footnote omitted).

<sup>16</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150 at ¶ 11 (rel. Aug. 6, 1999).

<sup>17</sup> *Bell Atlantic Corp.*, *Petition* at 8. n.22.

<sup>18</sup> *Cox Spurs Cable Consolidation With \$4-Billion Purchase of TCA*, *Communications Daily*, May 13, 1999, at 1, updated to include subsequent acquisitions by Top 7 MSOs.

four months since that report, at least five MSOs from the 1999 Top twenty-five list also have been swallowed up.<sup>19</sup>

Related to and reinforcing the market power created by the overall MSO consolidation is the dramatic increase in clustering that has occurred as the industry consolidates and MSOs trade systems to achieve total dominance in a particular region. This further insulates MSOs from competition, gives them even greater market power over regional sports and news channels, and makes practical the migration of such programming from satellite to terrestrial delivery to evade the program access rules.

The fact that this unprecedented wave of consolidations dramatically strengthens the hand of the top cable MSOs in dealing with programmers and increases the likelihood of collusion in such dealings was recognized by the Commission last year:

Although cable operators usually do not compete to serve the same subscribers in local downstream markets, they may have an incentive to coordinate their decisions in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this market is one indicator of the likelihood that coordinated behavior among buyers will be successful.<sup>20</sup>

**B. Cable MSOs Still Monopolize The Multichannel Video Programming Distribution Market**

Led by AT&T, cable MSOs still dominate the MVPD market just as they did when the 1992 Cable Act was passed, with the only change being that their monopoly share declined from ninety-three percent when the FCC issued its first report to Congress on competition to cable, to

---

<sup>19</sup> John M. Higgins, *Top MSOs Own 90% of Subs*, Broadcasting & Cable, May 24, 1999, at 34. Since that time, the acquisitions of Falcon, Fanch and Bresnan by Charter, Multimedia by Cox, and Comcast's offer to up its ownership of Jones Intercable to 79 percent, have been reported.

<sup>20</sup> See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24,284, 24,362 (1998) ("1998 Competition Report"). See also *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18,223, 18,322 (1996).

eighty-five percent according to the fifth report and to eighty-four percent today, according to AT&T.<sup>21</sup> Further, the modest decline in cable's share of the MVPD market has been outweighed by the rapid consolidation in the cable industry and the dramatic increase in regional clustering as a result of both the overall trend toward consolidation and massive system trades among MSOs. The result is increased market power of cable in dealing with programmers.

The best evidence of cable's continuing monopoly power is its ability to charge prices above competitive levels for a sustained period of time. The fact that cable price increases have been consistently higher than the Consumer Price Index has been widely reported. For instance, in 1998 cable prices rose by 6.9 percent compared to 1.6 percent for the Consumer Price Index.<sup>22</sup> Less publicized is the fact that, as Professor Hausman pointed out in the initial filing round, when an overbuilder enters a cable market, prices typically decrease by ten to twenty percent, significant evidence that prior to such entry the cable incumbent was able to exercise market power.<sup>23</sup>

Professor Hausman also makes the point that DBS, while a successful niche service, does not constrain cable prices.<sup>24</sup> If DBS was successful in keeping cable prices at a competitive level, one would not see the ten to twenty percent price decreases, which occur when an overbuilder enters the market. The factual record validates the statements of Chairman Kennard that "DBS, however, remains primarily a high-end product"<sup>25</sup> and Commissioner Tristani that "[i]n a truly competitive market things would be different. . . It shows how starved we are for

---

<sup>21</sup> *1998 Competition Report*, 13 FCC Rcd at 24,418, Appendix C, Table C; *Application* at 46..

<sup>22</sup> Cable prices rose by ten percent in 1996 and 7.5 percent in 1997 versus C.P.I. increases of only 2.5 percent and 1.6 percent, respectively. <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiat.txt>.

<sup>23</sup> *Petition of SBC Communications Inc.*, Declaration of Professor Jerry A. Hausman, ¶ 3.

<sup>24</sup> Hausman Decl., ¶ 9.

<sup>25</sup> *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 F.C.C. Rcd 1034, 1238 (1998) ("*1997 Competition Report*") (Statement of Chairman William Kennard).

competition that anyone would look at the competitive choice provided by DBS and declare victory.”<sup>26</sup> Thus, the promotion of competition in MVPD markets should remain a top priority of the Commission.

**C. Program Access Is Key To The Development Of MVPD Competition And Is Threatened By This Merger**

The protection of the ability of competitors to cable to obtain programming has been a central concern of government attempts to deal with the market power of large cable MSOs throughout the 1990s. Program access was a key element of the 1992 Cable Act whose essential thrust was to *promote* competition while protecting consumers until competition arrived. It was also a principal feature of both the federal and state Primestar decrees<sup>27</sup> and was the subject of the consent decree settling the Justice Department complaint against the TCI/Liberty Media merger.<sup>28</sup>

The concerns that led to these various government interventions remain just as valid today because the cable industry retains its monopoly power in the MVPD market. A recent GAO report that surveyed experts in the field found that some had concerns that “dominant cable operators are winning price concessions and may have significant bargaining power vis-à-vis subscription networks even when there is no ownership link.” According to the GAO report:

[M]ost of our expert panel members stated that program suppliers that are not vertically integrated (such as MTV, A&E Network and the Weather Channel) may be very dependent on large cable companies. Some of the expert panel members stated that programming of suppliers that are not vertically integrated should

---

<sup>26</sup> 1998 *Competition Report*, 13 FCC Rcd at 24,489 (Statement of Commissioner Gloria Tristani).

<sup>27</sup> *United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); *New York by Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993).

<sup>28</sup> See *United States v. Tele-Communications, Inc.*, No. 94-0948, 59 Fed. Reg. 24,723, 24,727 (May 12, 1994) (Proposed final judgment and competitive impact statement).

generally be required to be made available to all competitors, as is currently the case for programming owned by vertically integrated suppliers.<sup>29</sup>

Concerns such as these will be greatly aggravated by the proposed merger, which will put unprecedented power into the hands of a single giant MSO. As a majority of the Federal Trade Commissioners stated in connection with Time Warner's takeover of Turner Broadcasting: "Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers."<sup>30</sup> Given that AT&T alone will account for sixty percent of subscribers, its ability to require programmers to favor it over MVPD rivals will be virtually unchecked as a result of the MediaOne acquisition.

At the same time, the Commission has adopted a narrow view of the program access provisions of the 1992 Cable Act, finding them not applicable to non-vertically integrated programming<sup>31</sup> nor to programming shifted from satellite to terrestrial delivery.<sup>32</sup> Both of these findings by the Commission have a substantial impact on access to programming. First, the large majority of programming actually is not vertically integrated. In 1998, the Commission reported that only 95 (39 percent) of 245 national satellite-delivered programming services were vertically

---

<sup>29</sup> General Accounting Office, *Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, Telecommunications, The Changing Status of Competition to Cable Television* 22 (July 1999).

<sup>30</sup> Separate Statement of Chairman Pitofsky and Commissioners Steiger and Varney, *Time Warner Inc.*, No. 961-0004, 1997 F.T.C. LEXIS 13, at \* 61.

<sup>31</sup> *Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, No. CSR 5381-P, Memorandum Opinion and Order DA 99-1276, July 1, 1999.

<sup>32</sup> *DirecTV v. Comcast Corp.*, 13 FCC Rcd 21,822 (1998) *recon. pending*; *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999), *recon. pending*.

integrated, while 150 (61 percent) were not.<sup>33</sup> This continues four years straight of decline in the percentage of programming which is vertically integrated.<sup>34</sup>

A good many of the non-vertically integrated networks are subject to exclusivity agreements. Chairman Kennard has publicly identified the Game Show Network, Home & Garden Television, TV Land, MSNBC and Fox News as subject to exclusivity arrangements.<sup>35</sup> As of this date, Seren is unable to obtain Midwest SportsChannel, the Game Show Network and MSNBC due to exclusive contracts between AT&T or AT&T affiliates and programmers.

Seren's attempt to obtain access to the Midwest SportsChannel ("MSC") is illustrative of the roadblocks erected by AT&T/TCI to deter competition from rival MVPDs. MSC is a twenty-four-hour regional sports network which offers a wide range of sports programming. Among its programming are Minnesota Twins baseball games, Minnesota Timberwolves basketball games, University of Minnesota football, hockey and basketball games, and certain St. Cloud State University athletic events. Because MSC televises these popular games, its programming is highly desirable.

MSC is wholly-owned by CBS Broadcasting, Inc., and, as such, is a non-vertically integrated network. When Seren contacted MSC in 1998 to contract for its programming, Seren was told by MSC that it could not make its programming available to Seren because of an exclusive contract it had with TCI, the incumbent cable operator in St. Cloud through its Westmarc Cable Inc. affiliate.

When Seren raised this issue in the AT&T/TCI merger proceeding, AT&T and TCI responded that:

---

<sup>33</sup> *1998 Competition Report*, 13 FCC Rcd at 24,376.

<sup>34</sup> *Id.* at 24,377.

<sup>35</sup> Letter from William E. Kennard, Chairman, FCC, to W.J. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives, Response to Questions at 1 (Jan. 23, 1998) ("Kennard Letter").

TCI has been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases, even though it was under no obligation to do so under the program access rules. For example, TCI *voluntarily* waived its exclusive rights to the Chicago Cubs baseball games carried on CLTV, a local service in the Chicago area, which was a matter of particular interest to Ameritech. AT&T/TCI will continue to review requests to relinquish exclusivity for services not covered by the program access rules on a case-by-case basis and to act reasonably and responsibly in this area.<sup>36</sup>

However, when Seren contacted TCI to ask it to make good on its representation to the Commission, Seren was told by the regional manager that neither TCI nor Bresnan (the St. Cloud system was shifted from TCI to Bresnan during this period) was willing to waive its exclusivity and Seren was denied access to MSC.

It is not surprising that Seren has been faced with such tactics by AT&T/TCI, which has tremendous market power. It can use such power to disadvantage rivals either by vertically integrating into programming and then denying the programming to alternative MVPDs or by entering into exclusive contracts with non-vertically integrated programmers. The economic effect of either course is similar. As a basic economics text puts it: "Firms often write complex contracts that restrict actions of those with whom they deal. These vertical restraints can approximate the outcome from vertically merging."<sup>37</sup> Or, as Chairman Kennard reported to Congress: "[i]t is probably fair to say that the general conclusion is that an analysis *should focus on the source of any market power involved (the absence of competition at the local distribution level) rather than on vertical integration itself.*"<sup>38</sup>

---

<sup>36</sup> *AT&T Corp./TCI*, CS Docket No. 98-78, Comments and Joint Opposition to Petition to Deny or to Impose Conditions, at 66 n.143 (Nov. 13, 1998).

<sup>37</sup> Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization*, 499-500 (Harper Collins, 1999).

<sup>38</sup> Kennard Letter at 3.

A second and growing area of concern is the migration of programming from satellite to terrestrial delivery. AT&T poses a particular danger in this regard. As the Commission noted in its AT&T-TCI merger order:

We recognize, however, that the integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. . . [W]e remain aware of the potential for this type of migration and the possible need to address it in the future.<sup>39</sup>

As AT&T and the cable industry generally shift to digital technology, this future is quickly becoming the present. Thus the likelihood is that AT&T will be able shortly to argue that its vertically integrated programming is no longer subject to the program access rules because it will be terrestrially delivered. No fewer than 28 of the Top 50 programming services are vertically integrated with either AT&T or MediaOne<sup>40</sup> and thus could be removed from program access protection if AT&T switches to terrestrial delivery.

Therefore, between the shift to terrestrial delivery and the fact that a majority of program networks are not vertically integrated, AT&T will be able largely to evade the application of the program access rules, despite the fact that its monopsony power, which led to the enactment of the rules in the first place, will have increased very significantly.

This would be a giant step backwards. Fortunately, the Commission has the ability to prevent this from occurring by requiring AT&T, as a condition of merger approval, to agree that the program access rules will be applicable to all of its programming contracts whether or not with vertically integrated companies and regardless of whether delivery is via satellite or

---

<sup>39</sup> *TCI Order*, 14 FCC Rcd at 3180 (footnote omitted).

<sup>40</sup> *1998 Competition Report*, Table D-6, 13 FCC Rcd. at 24,450-24,452.

terrestrial means. Such relief would be directly responsive to the anti-competitive impact of the acquisition and would therefore be fully justified.


Because programming exclusivity may on occasion not be contrary to the public interest, Seren recommends that AT&T be permitted exclusivity where it has demonstrated to the Commission's satisfaction that an exclusive contract meets the public interest criteria and procedures detailed in 47 U.S.C. § 628(D)(4) and 47 C.F.R. § 76.1002(c)(4) and (5).

## V. CONCLUSION

For the reasons stated above, Seren respectfully urges the Commission to condition its approval of the license transfers sought by AT&T and MediaOne in connection with their merger on their agreement to the implementation of the conditions recommended by Seren above relating to program exclusivity.

Respectfully submitted,

Peter M. Glass  
Seren Innovations, Inc.  
15 South 5th Street  
Minneapolis, Minnesota 55402

  
James W. Olson  
Gregory F. Intoccia  
Howrey & Simon  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 783-0800

Counsel for Seren Innovations, Inc.

Dated: September 17, 1999

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments of Seren Innovations, Inc. were served by messenger (indicated by \*) or by first-class United States mail, this 17th day of September, 1999 upon each of the parties listed below:



---

Teri Price

Magalie Roman Salas\*  
Office of the Secretary  
Federal Communications Commission  
455 12th Street, S.W. - TW B204  
Washington, D.C. 20554

International Transcription Service, Inc.\*  
1231 20th Street, N.W.  
Washington, D.C. 20036

Deborah Lathen  
Chief, Cable Service Bureau  
Federal Communications Commission  
455 12th Street, S.W.  
Washington, D.C. 20554

To-Quyen Truong\*  
Associate Chief, Cable Services Bureau  
Federal Communications Commission  
455 12th Street, S.W. - 3-C488  
Washington, D.C. 20554

Frances Eisenstein\*  
International Bureau  
Federal Communications Commission  
455 12th Street, S.W. - 6-C866  
Washington, D.C. 20554

Walter Strack\*  
Wireless Communications Bureau  
Federal Communications Commission  
455 12th Street, S.W. - 3-C204  
Washington, D.C. 20554

Sunil Daluvoy\*  
Cable Services Bureau  
Federal Communications Commission  
455 12th Street, S.W. - 4-A737  
Washington, D.C. 20554

Leon M. Kestenbaum  
Jay C. Keithley  
Michael B. Fingerhut  
Sprint Corporation  
1850 M Street, N.W., 11th Floor  
Washington, D.C. 20036

Michael Tessler  
BroadSoft, Inc.  
200 Perry Parkway, Suite 1  
Gaithersburg, Maryland 20877-217

Robert J. Aamoth  
Steven A. Augustino  
Todd D. Daubert  
Kelley Drye & Warren LLP  
1200 19th Street, N.W., Suite 500  
Washington, D.C. 20036

Anthony C. Epstein  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036

George Vrandenburg, III  
Jill A. Lesser  
Steven N. Teplitz  
America Online, Inc.  
1101 Connecticut Avenue, N.W., Suite 400  
Washington, D.C. 20036

Khalil Munir  
Telecommunications Advocacy Project  
1221 11th Street, N.W.  
Washington, D.C. 20001

Earl W. Comstock  
John W. Butler  
Sher & Blackwell  
1850 M Street, N.W., Suite 900  
Washington, D.C. 20036

Charles C. Hunter  
Catherine M. Hannan  
Hunter Communications Law Group  
1620 I Street, N.W., Suite 701  
Washington, D.C. 20006

Richard E. Wiley  
R. Michael Senkowski  
Robert J. Butler  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

William T. Lake  
William R. Richardson, Jr.  
Julie A. Veach  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, D.C. 20037-1420

Geoffrey M. Klineberg  
Evan T. Leo

Kellogg, Huber, Hansen, Todd & Evans  
PLLC  
1301 K Street, N.W., Suite 1000 West  
Washington, D.C. 20005-3317

Richard G. Taranto  
Farr & Taranto  
1850 M Street, N.W., Suite 1000  
Washington, D.C. 20036-5802

Paul J. Sinderbrand  
Robert D. Primosch  
William W. Huber  
Wilkinson Barker Knauer, LLP  
2300 N Street, N.W., Suite 700  
Washington, D.C. 20037-1128

William B. Barfield  
Thompson T. Rawls, II  
Alan L. Silverstein  
1155 Peachtree Street, N.E., Suite 1800  
Atlanta, Georgia 30309

Lawrence R. Sidman  
Lisa M. Fowlkes  
Verner, Liipfert, Berhard,  
McPherson & Hand, Chtd.  
901 15th Street, N.W., Suite 700  
Washington, D.C. 20005

Steven G. Bradbury  
John P. Frantz  
Kelion N. Kasler  
J. Peter Ban  
Kirkland & Ellis  
655 15th Street, N.W.  
Washington, D.C. 20005

Harold Feld  
Cheryl A. Leanza  
Andrew J. Schwartzman  
Media Access Project  
1707 L Street, N.W., Suite 400  
Washington, D.C. 20036

Gary M. Epstein  
James H. Barker  
Kimberly S. Reindl  
Latham & Watkins  
1001 Pennsylvania Avenue, N.W.  
Suite 1300  
Washington, D.C. 20004